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# LEGAL PRINCIPLES AND ECONOMIC DEVELOPMENT: GENERAL CONSIDERATIONS

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# LEGAL PRINCIPLES AND ECONOMIC DEVELOPMENT: GENERAL CONSIDERATIONS

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1977

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103-03748/

Published under the authority of the
Hon. John C. Munro, P.C., M.P.,
Minister of Indian Affairs and
Northern Development,
Ottawa, 1983.

QS-3263-000-EE-A1

## PART I

## LEGAL PRINCIPLES AND ECONOMIC DEVELOPMENT: GENERAL CONSIDERATIONS

There is at the outset a definitional problem. For example: what does the term 'economic development' mean; that is, how specific or general are we to understand such a concept? Doe we view the term as defining a process, or more classically, is the concept static? More importantly, do we, even as a heuristic exercise separate the term from other terms of categorization, for example, social development or political development? The same problems apply to our definition of the Indian community, legal forms and to the law itself.

Although the difficulties one may have in agreeing on operational definitions are derivative of conflicting perspectives, attitudes and values towards the issues at hand; one must at least raise such problems as a distinct, if not discrete question. It is essential to keep in mind that our topic is the relationship between economic development and appropriate legal forms. For the purposes of this paper, the primary interest is the nature and character of the legal framework that now exist and that ought to be established as a means to ensure competent economic development. As such, we are concerned with the articulation of appropriate legal principles.

Although the technical and theoretical issues related to economic development are in and of themselves not the subject of this paper, we must establish some definitional understanding of this concept. While this paper does not refer to the concrete problems as related to economic development, reference must be made to certain theoretical premises; it is as against such premises that, at least at this stage in our discussion, the appropriateness of a particular legal form must be tested.

For the purposes of this paper the term 'economic development' shall be understood in one of two ways: therefore, throughout the report reference to the particular definition that is operative will be made.

The term economic development may be understood to mean the process whereby men and women organize themselves in order that they may meet present needs and wants. Furthermore, such activity is a process whereby future wants and needs are fashioned. Within this definition, economic development is for the purposes of analysis understood to be integral to the social and political needs of men and women.

The term economic development may also be understood to mean the process whereby goods and services are produced, exchanged, sold and traded. Within this definition, economic development is for the purpose of analysis understood to be discrete from the social and political needs of men and women.

The practical application of this dichotomy is evident when one considers, as will be further discussed in Part II, the application of the partnership form and the incorporated company form to this issue. Essentially, the partnership form may permit a greater flexibility; that is, particular needs and objectives may be more readily dealt with by this form and is therefore more adoptable to the first definition of economic development. The form of the incorporated company is more appropriate to the second definition, because of the distinction between the shareholder, the directors and the employees. Furthermore, the company does take on a life of its own, as distinct from the principal participants.

With respect to both definitions of economic development there is the common element that men and women will have to organize themselves within some framework, regardless of the particular form or of the particular objectives. The legal framework, from this perspective, provides the principles, rules and procedures of how they are to operate. Often such a framework provides for remedies of parties when there is conflict. It is essential that where ever possible, there exist as between parties subject to that framework a voluntary agreement as to the terms and conditions of such economic activity. Operationally, this need to emphasize the voluntary character of a business form extends itself to the participants voluntarily choosing which form is most appropriate. On a program level this means that whenever possible a contractual form of rights and responsibilities should be articulated. This emphasis on the organization of business affairs is in contrast to statutory or regulatory proscription as it affects business organization.

## PART II

## THE NATURE OF INCORPORATION AND PARTNERSHIP: REALITY AND MYTH

Prior to an analysis of the technical reasons surrounding the advancement and rejection of incorporation some general comments on the nature of incorporation and partnership are in order.[1] As started in the introduction, the purpose of this discussion is to establish workable principles for the establishment of legal forms that will facilitate Indian Economic Development. As such, the technical difficulties, while important, must never be permitted to override our broader considerations. From this perspective, any discussion of the advantages and disadvantages of incorporation or some other form must be grounded in a general appreciation of what a corporation is and is not.

### The Company

The essence of a company is that it is an association of persons whose object is the economic gain of its members. That association is usually defined as one class being proprietors, usually shareholders, and another class being managers. The legal fiction that is clearly created by the concept of the limited company is that

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[1] For the purposes of this paper, unless indicated to the contrary, reference to Provincial Statute will mean Incorporation pursuant to The Business Corporations Act, R.S.O. 1970, c. 53 (Revised Statutes of Ontario, 1970, c. 53 as amended); Federal Incorporation is pursuant to the Canada Business Corporations Act and Regulations, S.C. 1974-75, c. 33. Reference to partnership, unless otherwise stated is pursuant to The Partnership Act, R.S.O. 1970, c. 339.

a shareholder in a large corporation is viewed as being associated with that company by virtue of his shares. The reality is quite distinct; the association which is joined for the purpose of establising economic gain is that between management and the workers. Our present understanding of the law establishes that participants in that association, namely workers, have no legal status with respect to that association. On a smaller scale, it is quite possible that a number of individuals may join together for the purposes of economic activity. It may well be that only one of those persons is actually involved in the operation of that company. Again, a legal fiction is created insofar as there is an image created that there is an association.

From a functional point of view there are three types of companies:

1) Companies that are formed for the purpose of charity; i.e., they are not formed for the purpose of economic gain for their members;

2) Companies that are formed for the purposes of economic gain for their members. In such instances, incorporation serves to personify the business; and to divorce or separate the liability of the business from its members. In this instance, and usually in the situation where there are a few members, the primary consequence of this activity is TO SEVER THE LIABILITY OF THE BUSINESS FROM ITS MEMBERS EVEN THOUGH THOSE MEMBERS ARE ACTUALLY RESPONSIBLE FOR THE OPERATION OF THE BUSINESS ACTIVITY.

3) Companies that are formed to allow the public to share in the profits of an enterprise. The function is best exemplified by large public companies and more recently by public utilities in which the state (representing the public as a whole) operates through a company.

The Partnership

The concept of partnership, even in today's economic world, still conjures a sense of idealism. No less an authority than Professor Gower in his seminal work, The Modern Company Law, refers to partnership in the following manner:

> "...based on the law of agency, which established that each partner is the agent of the other partner.....suitable framework for an association of a small body of persons having trust and confidence in each other ....."

Gower continues to attempt to articulate the social significance of the company. The company is more adaptive to larger bodies with fluctuating members. A more elaborate organization is required in order to accommodate the nature of the social organization. Whilst it is not stated by Gower or by other commentators, it would appear that the form of the company is more appropriate where "mutual trust and confidence" is not readily obtainable.

Therefore, it is arguable that the numbers of members involved in an association should contribute towards the determination of the appropriate legal form. Concurrent to the question of size is the question of how such members wish to relate to each other as members of such an association. These themes will be returned to throughout the course of the paper, for the best answers to these questions often must be conditioned by our first working definition of economic development, and then by our second definition.

The statutory definition of a partnership as defined in the Partnership Act, R.S.O. 1970, c. 339 is:

> "Partnership is the relation which subsists between persons carrying on a business in common with a view of profit."

The relationship as between partners is conditioned by the law of agency; that is, each partner is liable for the acts of the other partner. The elements of the partnership are, at least, that:

There be a business, which can cover virtually every form of economic activity; that there be two or more persons carrying on the business; and, that there be an economic reason -- usually the gain of profit constitutes the reason for the business.

In order that there be a working basis for our discussion of partnership the following essential factors of partnership are provided.

Two or more principals must carry on the business. This has been held to mean that if several persons carry on the business on behalf of one person, then there is no partnership; the converse is not the case, one person operates the business on behalf of himself and for others, that constitutes a partnership. Indeed, in Ontario, under the Limited Partnership Act, provision is provided for a class of partners who are only liable for the amounts of the assets they have provided to the activity, even though they may not be actually responsible for the operation of the activity.

Profits must be shared as between partners on the net gain after payment of all expenses. Furthermore, it is suggested that pursuant to the Parntership Act, that there must be at some point in time a division of the profits for the benefit of one or all of the partners.

Finally, and as a matter of important practical concern, a partnership is a contractual relationship. The agreement between the partners, express or implied, but subject to the Partnership Act, will control the nature of the relations between the partners.

The practical consequence is that a partnership, again, subject to the Partnership Act, may form any contractual relationship as between the parties; this affords considerable latitude with respect to type of working agreements that might exist between members.

The limited company, in contrast, is subject through Statute and Regulation to controls over the duties and responsibilities of members of that corporation. While such controls may not be onerous the flexibility established in the Partnership Agreement may be of greater use, particularly in the formative period of establishing an economic enterprise.

The question as to whether or not the appropriate legal form should be a company (incorporated) or a partnership must to a certain degree be answered by the extent of the relationship

between the chosen form and the relationship between that form and existing Federal, Provincial and Municipal legislation. Often, the question comes down to the issue of the dominance of the Indian Act over other forms of legislation; and, therefore, the resultant exclusion of Provincial or Municipal legislation.

## PART III

## THE NATURE OF THE PROBLEM: A MATTER OF DEFINITION

At this point in time, when an Indian Band, pursuant to the Indian Act, wishes to develop or organize a business for the purpose of economic gain, the Indian Affairs Branch prefers that the legal form for such activity be to form a limited company pursuant to the Provincial Statute or to Federal Statute when appropriate.

The reasons for this position are enumerated as follows: -

1) that incorporation allows for the benefit of limited liability;

2) that there is a lack of perpetual succession as between business entities;

3) that there are uncertainties surrounding the legal status of Bands, and that, therefore, without incorporation there is uncertainty as to liability;

4) that certain provisions in certain Provincial Statutes require Incorporation; and,

5) that the status of Incorporation provides for a better form of business activities because of the advantages of that form for the purpose of raising capital.

By contrast, objections to the previous position as expressed by Indian Bands are: -

1) that Incorporation will require the application of Provincial Statutes and regulation with respect to the operation of business activities on reserves;

2) that Incorporation may jeopardize the surrender of lands, or some other form of alienation;

3) that Incorporation will result in the loss of present tax advantages presently held by an Indian earning a living on a reserve;

4) that the demands on an Incorporated Company are unnecessary and alien to a Band or Band Council with respect to the level of business activity in which they are engaged; and,

5) that an incorporated entity known as a corporation may as a distinct entity from the Band and the Band Council provide a vehicle for conflict.

Against this general background it is now appropriate to evaluate the various reasons that lay for or against incorporation; most particularly, those reasons that lay for incorporation as expressed by the Indian Affairs Branch.

1. There is no question that the Incorporation of a Company provides for the limited liability of the members of that company. This is the practical consequence of the creation of the legal fiction: the Incorporated Company. However, this does not absolve the company from liability where the winding down or dispersal of assets is concerned. If, as a matter of course, the assets of individual members are limited, or non-existent, there is the question of how real is the financial damage to those persons who are members of an unincorporated association. Furthermore, there are various legal problems surrounding the ability of creditors to attach the assets of Indians on reserves. These reasons do not dispense with the principal advantage of incorporation; limited liability. Such advantage must be weighed against any disadvantages.

2. It would appear that it is a view that an Incorporated Company offers the only form for perpetual succession. This is an exaggeration. Partnerships can within the normal usage of the term "perpetual succession" that is, for the life of the business, maintain such succession. Indeed, the legal form of partnership can be altered through various stages of development, the least of which involves the changing of partners, the amalgamation of various partnerships, and the merger of a partnership to a limited company. Furthermore, a partnership can be formed between an Incorporated Company and a partnership. It is correct to assume that a company is perpetual in the sense that the company may survive its members upon death. However, if as a matter of concern, there is difficulty with the continuation of the personification of the name of a business, the legal form of partnership permits the carrying on of a name of a business beyond the death of a partner. For example, a partnership can be carried on the firm name with reference to the partners.

3. It would appear that for a considerable period of time, the Indian Affairs Branch, as it is now known, has maintained that the Band is not a legal entity. This position in recent years has been modified to suggest that there are difficulties in assuming that the Band is a legal entity. Such modification has revolved around the issue of the extent of the legal authority of a Band pursuant to their powers under the Indian Act. It is fair to suggest that the confusion is considerable

because as a matter of policy there has been no clear articulation of power pursuant to the Indian Act. Concurrently, there is confusion with respect to the nature and character of the legal authority of the Band pursuant to the Indian Act.

At this point, our concern is specifically with the issue of whether or not a Band Council has legal status to bring an action, or, whether an action can be brought against a Band Council. The principal question is whether a Band Council has the status to assume legal responsibility in contract. It is respectfully submitted that there is no question on this point.

In the recent unreported decision of Mr. Justice Anderson of the Supreme Court of British Columbia in Lindley, Eli and Louie as members of the Westbank Indian Band and for the Westbank Indian Band and for and on behalf of themselves personally and for and on behalf of the Westbank Indian Council and the majority of the members of the Westbank Indian Band as Plaintiffs, and Ronald Michael Derrickson, Defendant, Mr. Justice Anderson held:

> "I am of the opinion that the Band Council had status to bring this action. The Band Council was elected by the members of the Band and while no express powers are contained in the Indian Act, the Band Council must have the implied powers to bring legal proceedings on behalf of the Band. It must also have the implied power to defend all actions, including counterclaims, against the Band. It cannot be supposed that the Band Council would have to hold a meeting of the Band and obtain specific authority from such meeting to sue

> or defend. I think the Band Council can sue, or defend, any action pursuant to Section 2 (3) of the Indian Act, and I find that Section 2 (3) has been complied with in this case."

While it may be argued, and indeed it will, that such a decision only affects the authority of the Band Council subject to the particular cause of action in this case; such a position can be resisted.

Reference to the style of cause is particularly important in that style, many options are covered with respect to who could bring an action and on whose behalf. Specifically enumerated is the position that the Band Council can act for itself and for the members of the Band. Strictly interpreted, the Band Council can nominate a member of the Band Council to represent the Band Council, the Band and the majority of a Band in an action. However, His Honour proceeds beyond that point to argue that the Band Council can in and of itself sue or be sued. This is suggested by the position, as presented by His Honour, that the Band Council does not have to refer to the Band for the purpose of obtaining authority to proceed with an action. The converse is also the case, in an action against the Band Council, the authority of the Band is not required. Therefore, it would appear that a Band Council, as a legal entity which can sue and be sued, can be liable for business activities. The real issue, in the case of liability, is the extent to which assets can be realized which are owning to creditors.

There are two points which must be pursued at this point. First, if, as suggested, the Band Council can sue and be sued, and therefore, for the purposes of business activities is a legal entity, then the specific question of the need for a responsible entity is negated. Second, and this remains the critical issue, is it appropriate for a Band Council to engage in business activities. If this is not the case, whether because of the nature of the economic activity, or because of social and political reasons particular to a Band and the Band Council; then, the issue remains what is appropriate. The determination of the appropriate legal form, premised on the Band Council being a legal entity should be determined on the basis of the objectives of any economic development program.

4. The issue of the necessity to follow Provincial legislation with respect to the necessity to form a limited company as distinct from a partnership when the number of members exceeds a certain number as is the case of the Province of Saskatchewan, is a technical difficulty. If, as a matter of economic interest, the limited company form is not a necessity, then a partnership of the requisite number can be formed. If this is not sufficient, then a number of partnerships can be formed. Such partnerships can be broken down on a functional basis.

5. If, as a matter of economic activity, it is advisable that a Band Council wishes to raise capital through shares then it is necessary that such an economic activity be incorporated.

However, the partnership form does permit the raising of capital; this is most clearly recognized in the Limited Partnerships Act, R.S.O. 1970, c. 247. This Act permits a class of partners to contribute capital. Such partners, known as limited partners, are personally liable only to the amount that they have placed into the partnership. The real test as to whether or not an economic activity should be incorprated with respect to the raising of capital is whether such funds will be obtained from the public, the amount of such funds, and the use to which they should be put. The suggestion that incorporation should be instituted when the economic realities dictate that no such activities are contemplated, nor will be, is unnecessary.

Review of Objections to Incorporation

1. It would appear that Provincial Statutes and Regulations affecting incorporation would be effective when the objects of a particular activity fall within Provincial jurisdiction. However, it would also appear that Provincial legislation and regulations would apply with respect to other forms of business activity. While it is arguable that such Provincial legislation and regulation affecting partnership and other forms, as, for example, co-operatives, would apply to business activity on a reservation, it is possible that another view is operative. That view suggests that there is no general principle which would suggest that in all instances business

activities are subject to Provincial legislation. If the legal entity carrying on the business is the Band Council and if such a business is carried on within a reserve and the framework for the operation is a contract as between the members of the activity and all other parties, then such Provincial legislation should not apply. However, the critical test must be the effectiveness of the appropriate legal form to the business activity. In such circumstances, machinations to avoid the effect of Provincial legislation may be self-defeating.

2. For the purposes of incorporation, a company cannot be an Indian. Therefore, if a corporation is formed pursuant to Provincial or Federal legislation it would appear that such a business cannot be located on a reserve unless appropriate procedures are followed which permit a non-Indian to occupy such lands. On the other hand, a partnership may, if all of the members of that partnership are Indians, locate their business on a reserve without the necessity of alienating lands. With specific reference to the Limited Partnership Act of Ontario, it is possible to argue that even if a partnership contains non-Indians, it is possible that such a partnership can be located on reserve lands. This argument may be based on the fact that there are two classes of partners: therefore, those partners if they are involved in the operation and management of the business are Indians, may satisfy the requirement of the Indian Act. Therefore, alienation of land is not required.

3. The issue of taxation, whether Federal or Provincial, is troublesome; complete with technical difficulties and issues of fairness and equity. As a matter of practice, an Indian is not taxed for income earned on a reserve. In this instance, the domicile of the Indian is not the issue which determines taxation; it is the place of employment, not residence. As with land, a company cannot be an Indian for the purposes of the Indian Act; nor for the purposes of taxation. Therefore, income earned by a company on a reserve is taxable. Because of the practice of the Department of National Revenue, an Indian who earns an income from a corporation which is situated on a reserve may not be taxed on that amount.

There is a possibility that an argument can be raised to support the proposition that a Band Council should be exempt from taxation. Pursuant to the Department of Revenue's Interpretation Bulletin It-62 which states, inter alia, that a municipal or public body performing a function of government in Canada is exempt from taxation under Part 1 of the Act (The Income Tax Act) which includes those Band Councils authorized to exercise powers under Section 81 and 83 of the Indian Act. At this time, it is unclear as to the legal position of this Bulletin.

There are with respect to the issue of taxation some delicate and sensitive factors which must be considered. There is at the most general level the question as to whether or

not general principles of taxation should apply to Indians on reserves. This, of course, raises the question of whether or not an Indian, whether as a person or as a company, should have a different tax status than other individuals and business forms.

There is no doubt that as part of its activities, any company will seek to establish for itself the most advantageous tax position. There is, however, a fine line (which affects economic planning) between those considerations which gain the most tax advantage for a company; and that planning which permits considerations of tax to dominate the development of a business. From this perspective, it is both advantageous and functional for an enterprise to consider the tax benefits or losses with respect to the form and activity of a business enterprise. However, cold reality must at some point prevail; are the tax losses real or imaginary; are the concerns symbolic rather than economic. If, as a matter of course, those advantages now held by Indians are real and could contribute towards economic development, then full consideration must be given to them. But, if consideration of the appropriate form, from a functional perspective is skewed because of a limited gain because of a tax advantage, then consideration should be given to persuading such parties to forego the tax advantage.

4. There is concern that the limited company establishes procedures that people are not familiar with and that therefore this is a problem. There are comments in the materials provided by the Indian Affairs Branch which suggest that it is the view of some officials that a lack of knowledge on the part of Band members contributes to their hesitancy to accept incorporation. It is suggested that with respect to a Band member or to Band members there is a great deal to be worried about with respect to choosing an appropriate form. In effect, there are concerns which are raised, such as those previously discussed, which raise complex questions, particularly with respect to those rights and privileges which Band Councils believe they have.

5. There is concern that the corporate entity shall contribute towards political conflict within a Band. This is a subject of enormous complexity and can only be handled with a clear appreciation of the social and political facts which lead to the perception of such conflict. In the absence of such facts, general comments will suffice, and such comments by way of analogy.

There is little doubt that a primary political problem facing most Western industrialized states is the degree to which the state can and ought to control corporate activity in order to meet economic objectives. It was often assumed that the interests of the State and those of corporations

were identical; or, if not identical then of sufficient mutual benefit so as not to create undue conflict. Whether, as a question of fact, this was the case is debatable. However, within the course of the past twenty years there has emerged elaborate mechanisms to bring corporations under legislative control in order that public policy can be served. The Corporation has a primary target; the maximization of profits. The theoretical and practical base for this goal is the accumulation of assets and the creation of profit in order that shareholders may be given an appropriate return. The corporation gains a purpose and meaning unto itself; such purpose and meaning may not be sufficient in their interests to meet the demands of the State with broader responsibilities and interests.

Within this context, it is easier to understand the concerns raised by Band members about the position that a corporation would have: what is its relationship to the Band Council; and, what relationship would the activities of the corporation have to the development of the Band. Reference to the twin heads of economic development and the objectives therein establishes a framework within which such considerations must be discussed. If economic development is viewed strictly as a question of the provision of goods and services with a view of profit; then the corporate form, as an abstraction, may be functionally important. If, however, the perspective on economic development is one of providing an essential

process whereby there is a capacity to alter the future then the necessity to establish the relationship between political terms and economic terms is critical.

## PART IV

## THE INDIAN ACT AND ECONOMIC DEVELOPMENT

The Indian Act R.S.C. 1970, c. 1-6 and the Indian Economic Development Regulations SOR 72-247 are the critical legislation and regulation affecting Indian Economic Development: that is, the legislative framework as established in the Indian Act and the manner in which that Act is administered. Other legislation, whether Federal or Provincial are important insofar as such legislation impinges upon the authority of the Indian Act.

### The Indian Act

The Indian Act, in most of those sections with which we are concerned with respect to economic development, speaks of the Band and not the Band Council. In effect, authority that is vested by the Indian Act, or that ought to be vested goes to the Band. Pursuant to Section 2 (3) of the Indian Act, such powers as conferred upon a Band cannot be exercised unless there is a consent of the majority of the Band. Furthermore, power conferred upon the Band Council shall not be exercised unless there is a consent from the majority of the councillors of such Band. Therefore, as between members of the Band; as between the Band Council and the members of the Band; and as between members of the Band Council there is the presupposition that no authority can be deemed unless there is a majority consent.

the members of the Band; and as between members of the Band Council there is the presupposition that no authority can be deemed unless there is a majority consent.

In part, Indian Affairs Branch policy with respect to the necessity for incorporation on a reserve stems from the view that the Band has no legal status, or to be more precise, that the Band has no legal status for the purposes of economic activity. It is suggested that while the status of a Band may remain vague with respect to its legal status, it is possible to argue that those individual Band members that would constitute members of a business activity would have a legal status. The issue at that point is the extent to which they would be liable and for what assets. The Indian Act does not speak to the rights of an Indian with respect to authority being deemed to that person. Therefore, an individual who wished to engage in economic activity without the consent of the Band would have difficulties. This is an anomalous situation, because the Indian Economic Development Regulations pursuant to Section 2 (c) contemplates that an "applicant" for a loan can be an Indian; and, that pursuant to Section 2 that a sole proprietorship can be contemplated under the regulations.

Furthermore, the Indian Economic Development Regulations contemplate that an Indian Band or an individual, partnership or corporation whose activities contribute or may contribute to economic development of Indians may apply for a loan. It is noted that no specific reference is made to a Band Council applying for a loan.

Band, appear to be implied. One must always be aware of the legal distinction that is created in the Indian Act between the Band and the Band Council. Technically, unless so authorized, Band Councils are not the executive of the Band; Band Councils do not have the authority to conduct business on behalf of the Band; and the rights and duties of both entities are distinct. In part, this flows from the proposition that a Band cannot delegate its authority to the Band Council.

At this point, it is necessary to set out two distinct considerations; the manner in which these considerations are set out and the manner in which they are analyzed form the basis for our discussion of appropriate legal forms.

Bands and Band Councils

The root issue, as between the authority of the Band and the Band Council with respect to economic development must centre upon the extent to which members of the Band view their development as separate from their government, the Band Council; or, the extent to which that form of government is to be given control over the development of the Band. It must be stated that it is not the intent of this discussion to assume any position with respect to that question. However, it must be made absolutely clear that whatever choices are made with respect to the appropriate legal form for economic activity, that there are political consequences. For that reason it is necessary to work through a series of options.

The first consideration stems from the presupposition that there is consent as amongst the Band and the Band Council that a particular economic activity should be engaged in. This also presupposes that the requirements of Section 2(3) are fulfilled; therefore, the ruling in the Lindley case should apply and the Band Council can sue or be sued.

The second consideration stems from the presupposition that there is no agreement (this does not imply a lack of consent) as between the Band and the Band Council. In such circumstances, the critical issue is the status of the Band.

While these considerations are broad there are implicit principles underlying their consequences of such considerations. There is first of all the principle that obligation is the essence of contract. While as a matter of strict legal interpretation, it might be argued that statutory provisions can negate a contract as between parties; it is suggested that principles of contract be our starting point and that statutory provisions be interpreted, wherever possible, from that perspective. The second principle is that legal framework should serve the development of the Band. Therefore, such a framework should be capable of accommodating the factual conditions underlying the two situations discussed above. As well, the legal framework should not be interpreted as being static; that is, an option chosen today can, and probably will, be altered at a later point in time.

Considerations of Appropriate Legal Framework
Agreement between the Band and the Band Council

In this situation, there is the subsisting relationship between the parties to engaged in economic activity. While the actual nature of their relationship is problematic, there remains the willingness and capacity to pursue a common objective. For the purposes of this discussion, and unless otherwise specified, it is assumed that all parties are Band members; therefore, those problems that are created when non-Indians participate in economic activity are not mentioned unless so designated.

Pursuant to the Indian Economic Development Regulations, an "applicant" subject to Section 2 may be an Indian, a group of Indians, an Indian Band, or an individual partnership or corporation. For the purposes of Section 3 (a), an "applicant" may apply to the Minister for a loan. While the Minister under the Act and under the Regulations is given broad discretion, there remains an interesting question; in the absence of legislation or regulation to the contrary, is it a fair administration of the regulations to assert that there be incorporation prior to the making of a loan when such regulations provide to the contrary.

For the purposes of this discussion, our considerations will focus entirely upon the applicant being a sole proprietor or a partnership. The regulations contemplate that the parties so identified as being capable of applying as "applicants" are discrete. Therefore, a group of individuals may apply as a partnership or the Band itself may apply. If it is a partnership which

applies, then it must be assumed that the Partnerships Act in their respective provinces are operative. If the Band applies then it may do so in its own name.

Partnership

The critical component of the partnership agreement is that principals are agents for each other. Therefore, in order for a partnership to be effective, there must be, as suggested by Gower, trust and confidence. Pursuant to the economic interests of a Band, it is possible that there would be several partnerships. Each such partnership could have a functional definition with a small number of people attached to each. Furthermore, the terms of the partnership agreements could vary with respect to the particular needs of the partners.

As stated, partners are jointly and severally liable. The question of liability appears to be of some importance; therefore, the issues related to liability of corporations and partnerships will be reviewed. It is interesting to note that the Indian Affairs Branch urges incorporation of a limited company because it ensures limited liability. While the assets of the corporation, in persona as a person can be seized, the assets of the individuals cannot. In the partnership form the assets of the business can be seized and if care is not taken to transfer personal assets to another party, the assets of a partner may be taken. Therefore, it is quite possible, in the partnership form to ensure that personal assets are not realizable.

The issue of partnership and liability can be pursued from another direction. In the world of commercial activity, creditors do not usually care who they get their money from. Therefore, a creditor who does not gain satisfaction from one party may seek out other parties. From this perspective, the problems associated with the legal status of the Band revolve around issues which would permit a creditor to join the Band in an action where there was a partnership. The obvious difficulty is that the Band would claim that they are not a legal entity and therefore they would not be liable. Any creditor conscious of this would seek guarantees. Furthermore, as a matter of practice, creditors will demand a personal security from officers of a corporation in the formative stages of development.

There are, it would appear, ways of dealing with this problem. First, where a partnership is formed and where there is Band consent, but it is felt that the partnership should be the identifiable business unit, it is possible pursuant to Section 69 (1) of the Indian Act that the Band expend funds to the partnership.

Second, where a partnership is formed, and it is the preferred business unit, it is possible pursuant to Section 73 (1)(m) of the Indian Act for the Band Council to borrow money for Band projects. Although the Band Council to borrow money for Band projects. Although the Band Council is not designated in the Regulations as being capable of borrowing funds, it is arguable that the provisions of the Indian Act prevail and that for the

purposes of the Regulations, the Band Council may be deemed to be permitted to make loans.

Third, the Band may apply for funds pursuant to the Regulations. The terms of such an application would designate a partnership or partnerships as the agents of the Band.

In all three instances, as mentioned above, the legal entity for the purpose of an economic activity would be the partnership. A source of capital could be alternatively the Band or the Band Council. The terms of the contract as between the partnership and the supplier of capital would be subject to negotiation. Such negotiations could cover all aspects of a business nature.

Furthermore, with respect to third parties, which would include all interests with which the partnership would interact, their rights and obligations could be negotiated.

The Lindley case established that a Band Council can sue and be sued. It is a legal entity, but subject, one must assume, to a fulfillment of Section 2(3); that is, the Band Council becomes a legal entity if it can be shown that Section 2(3) has been met. As such, the concept that the Band Council is a legal entity may only be drawn from facts which attest to it being a legal entity. Therefore, one must still be cautious and adopt the position that by implication a Band Council can be shown to be a legal entity.

The Legal Status of the Band

When one considers the position of the Band, it is suggested that the issue is quite complex. There is considerable argument that a Band is a legal entity; indeed, one could only wish that it is convincing. It is important to outline the reasons which may impair consideration of the Band as a legal entity. By dealing with such reasons alternatives may be developed to consider the ways in which a Band may be constituted as a legal entity for the purposes of economic activity. In effect, it is suggested that one must address the hard issues surrounding this problem before an adequate resolution may be discussed.

The Band as alegal entity is a unincorporated association. Therefore, it has no legal existence apart from its members. It is not a legal entity capable of suing or being sued in its own name; it is not capable of contracting or appointing an agent; and service cannot be effected against its officers. Such a view is based on the law in the Province of Ontario, and the Rules of Practice in Ontario.

There are three ways in which the nature of the Band as an unincorporated entity can be affected in order that it may be constituted as a legal entity.

First, there are provisions in the Indian Act, notably Section 69 (1) which would suggest that the Band upon being deemed with

the authority in that Section must be capable of contracting. Similarly, Section 60 may be so interpreted. The basic preposition is quite simple; an act authorizing a particular entity to engage in an particular activity would carry with it the responsibility and liabilities of their acts.

Second, and this is the basis upon which the inter vivos trust is established, an association can vest those properties in trustees for the benefit of its members. Therefore, the trustees may either sue or be sued.

Third, an agreement as between the association (as ratified by all members) can be instituted between the association and a second party. However, only those members which ratified the agreement are liable. This forms the basis for the Referendum Contract as between the Band and the Band Council.

Therefore, the capacity of a Band to become a legal entity for the purposes of economic activity is arguable; and, indeed, the various measures open to such development exist.

The singularly attractive aspect of this option is that a Band may apply directly for loans subject to the Indian Economic Development Fund. Because it is possible that a Band can become a legal entity, possibilities exist to establish a framework for economic activity that is particularly adaptable to the needs of a Band.

The position adopted with respect to the nature of the legal character of a Band should not be interpreted as forwarding the argument that the Band should not be considered as a possible legal entity for economic activity. Quite to the contrary, legal tools can be used which may prove advantageous.

There is an additional method which can be utilized. Section 4(2) of the Indian Act can be used to negate any Section of the Act other than Sections 37-41; consideration should be given to its possible use where conditions warrant.

With respect to the previous options, there is the possibility that a non-Indian may be involved in economic activity on a reserve. In such circumstances, reserve land may be surrendered. In such circumstances, Section 28 (2) should be invoked in order to avoid that conclusion.

If the Band, without the agreement of the Band Council, seeks to develop an economic activity, then the options with respect to the identified options are narrowed. Clearly, when incorporation is not the desired legal form, the most viable option remains the partnership form. The possibilities for that development have already been reviewed. If that form is not desirable then the Band as a legal entity is available; but, subject to the limitations previously outlined. There is the additional problem that it is the Band Council who can consent to the use of Section 28 (2). Therefore failure to gain such consent will cause difficulties where there are non-Indians involved.

## PART V

## SUMMARY AND CONCLUSIONS

1. Under the Indian Act, those business forms known as the sole proprietorship, the partnership and the incorporated company can be used for the purpose of economic activity.

2. The Band Council and the Band can, under certain circumstances be utilized as a business form either by itself or as a party in relation to some other entity. For example, the Band Council in partnership with another partnership.

3. Because of the heterogenity of the Indian community; the range of economic activities available; the multiplicity of ways in which legal arrangements can be worked out; that no single formula or approach to the utilization of the Indian Act is possible.

4. Therefore, the Indian Act will have to be managed in such a manner that it can be utilized to accommodate a range of situations.

5. In effect, the problem is not a lack of choice, but rather a broad range of choices.

6. As stated in the body of the report there are advantages and disadvantages to the incorporated company and to the partnership form. However, as a practical matter it is quite possible for the partnership form to evolve into the limited company. The partnership form offers the advantage of joining together in series a number of projects; each a partnership unto themselves, but together they constitute a joint venture in the form of a partnership.

7. As stated in the body of the report, the Band and the Band Council can under certain circumstances be a legal entity for the purpose of carrying on economic activity.

8. With respect to the previous point, it is possible to free a Band and Band Council from all restrictions in the Indian Act, except Sections 37 to 41. Section 4 (2) allows the Governor in Council to proclaim this Act (the Indian Act) or any portion of the Act not to apply to any Indians or any group or band of Indians.

   Therefore, pursuant to the Indian Act it is possible to negotiate any set of agreements with respect to what in effect would be an amended Indian Act, subject of course to Federal and Provincial jurisdiction.

9. The availability of Section 4 (2) may permit great flexibility in the design of programmes. In effect, all aspects of

intra Band and inter Band and Federal government economic activity could be re-worked on a contractual basis without the imposition of legislation; that is: the Indian Act. In effect Section 4 (2) would permit the formation of a Charter as between an Indian Band, or Indian Bands and the Federal government.

10. A second order set of options revolves around the position that is taken with respect to the legal status of the Band and the Band Council. Based on the assumption, subject to Lindley and as analyzed in this paper, the Band Council is a legal entity which can sue or be sued in its own name. Therefore, funds can be funnelled through the Band Council. The Band Council could then extend that money to economic projects on the reserve. In such circumstances the Band Council would be liable. Alternatively, each project could either be a partnership and/or an incorporated company. In such instances, such projects would be liable pursuant to the nature of the contract between the projects and the Band Council.

11. Section 73 (1) (m) contemplates this relationship with respect to the Band Council borrowing monies for the purpose of establishing housing projects.

12. The second order problems under points 10 and 11 are categorized as such because the Indian Act is simply being used to determine

the relationship between the Federal government; the Band Council; and the economic project, as distinct from the application of Section 4(2). In effect the project can be a project of the Band Council. Therefore, the Band Council would be the agent for such activities. Alternatively, the Band Council is a stake holder in the projects. That is, the Band Council, although liable for certain terms of the agreement in its role as stakeholder is not liable for all aspects. The projects themselves would hold some liability.

13. A third order of problems surround the status of the Band. Section 69 (1) suggests that where possible the Band may expend revenues. In such circumstances it is suggested that the Band would bear contractual liability where it engaged in economic activity pursuant to Section 69 (1). It would appear that Section 69 (1) would be most effectively used through the inter vivos trust or referendum contract.

14. The principle issue with respect to the position of the Band is identification of those parties that would be liable. Once this step has been taken, then subject to the contract, liability has been established. In such circumstances, either through Section 69 (1) or by agreement between the Federal government, through the Fund, the Band could enter into the same relationship with economic projects as described for the Band Council.

15. If, as a matter of course neither the Band nor the Band Council are to be involved in economic activity as either agents or stakeholders, then the relationship is directly between the Federal government, or other institution and the project. In such circumstances any business form is permitted; the question is then, what is appropriate?

CONCLUDING REMARKS

At the outset of this paper it was stressed that a great emphasis must be placed upon the capacity to develop a voluntary agreement amongst all parties to an economic development project. Within the present context; that is under the Indian Act, effective economic development and the selection of an appropriate vehicle for such development can only occur with the highest degree of co-operation. For example, Section 4 (2) provides an enormously valuable method for a total reorganization of the relationship between an Indian community and the Federal government. However, to actually operationalize and utilize that Section of the Act will require time and a capacity to negotiate.

The critical factor is that in order to use the Indian Act, there must be agreement amongst all parties that in fact the Act can and should be used.